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No. 88-64

In the Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF MISSOURI, et al.,
Petitioners,

vs.

KALIMA JENKINS, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Eleventh Amendment prohibits an award of attorney's fees against a State based on current hourly rates which include interest and a delay in payment factor.

2. Whether paralegal and law clerk expenses awarded under 42 U.S.C. § 1988 must be assessed at actual cost rather than market rates.

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The parties to the proceeding in the Court of Appeals were as follows:

Appellants/cross-appellees
(now petitioners):

The State of Missouri

The Honorable John Ashcroft, Governor of the State of Missouri

The Honorable Wendell Bailey, Treasurer of the State of Missouri

Dr. Robert E. Bartman, The Commissioner of Education of the State of Missouri

The Missouri State Board of Education: Roseann Bentley, Dan L. Blackwell, Terry A. Bond, Thomas R. Davis, Susan D. Finke, Raymond F. McAllister, Jr., Cynthia B. Thompson and Roger L. Tolliver

Appellees/cross-appellants
(now respondents):

Kalima Jenkins, by her next friend, Kamau Agyei

Carolyn Dawson, by her next friend, Richard Dawson

Tufanza A. Byrd, by her next friend, Teresa Byrd

Derek A. Dydell, by his next friend, Maurice Dydell

Terrance Cason, by his next friend, Antonia Cason

Jonathan Wiggins, by his next friend, Rosemary Jacobs Love

Kirk Allan Ward, by his next friend, Mary Ward

Robert M. Hall, by his next friend, Denise Hall

Dwayne A. Turrentine, by his next friend, Shelia Turrentine

Gregory A. Pugh, by his next friend, Barbara Pugh

Cynthia Winters, by her next friend, David Winters, on behalf of themselves and all others similarly situated

Additional
Appellants/cross-appellees below:

The School District of Kansas City, Missouri, and Claude Perkins, then-superintendent

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eighth Circuit is reported at 838 F.2d 260 (8th Cir. 1988) and is reprinted in Petitioners' Petition for Writ of Certiorari in the Appendix at page A-1.

The May 11, 1987 opinion of the United States District Court for the Western District of Missouri is unreported but is reprinted in Petitioners' Petition for Writ of Certiorari in the Appendix at page A-22. The July 14, 1987 opinion of the United States District Court for the Western District of Missouri is unreported but is reprinted in Petitioners' Petition for Writ of Certiorari in the Appendix at page A-44.

JURISDICTION

On January 29, 1988, the United States Court of Appeals for the Eighth Circuit issued its order affirming the District Court's judgment awarding attorney's fees and expenses. On April 13, 1988, the United States Court of Appeals for the Eighth Circuit issued its order denying Petitioners' Motion for Rehearing *En Banc*.

A Petition for Writ of Certiorari was filed by Petitioners herein on July 5, 1988. Pursuant to 28 U.S.C. § 2101(c), the Petition was timely filed. Certiorari was granted on October 11, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

In relevant part, 42 U.S.C. § 1988 provides:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

CONSTITUTIONAL PROVISION

The relevant constitutional provision involved in this case is the Eleventh Amendment which provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

STATEMENT OF THE CASE

This case is the fee tail of the desegregation litigation involving Kansas City, Missouri.[1] This Court has granted

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1. The Kansas City, Missouri desegregation litigation has resulted in numerous published opinions. *Jenkins v. State of Missouri*, 838 F.2d 260 (8th Cir. 1988), is the only published fee decision. For information concerning the history of the underlying litigation, the Court is referred to the following decisions: *In re Jackson County, Missouri*, 834 F.2d 150 (8th Cir. 1987); *Jenkins v. State of Missouri*, 807 F.2d 657 (8th Cir. 1986) (en banc), *cert. denied*, 108 S.Ct. 70 (1987); *School District of Kan-*

(Continued on following page)

certiorari on two issues concerning the fee awards. One, whether the States' Eleventh Amendment immunity precludes a fee award based on current hourly rates which include prejudgment interest or a delay in payment factor. Two, whether 42 U.S.C. § 1988 allows reimbursement for paralegal and law clerk services at market rates rather than actual cost.

The plaintiff/schoolchildren were represented throughout most of this litigation by two groups of attorneys—Arthur A. Benson II and his staff and the NAACP Legal Defense Fund, Inc. (LDF). While this case was originally filed on May 26, 1977 (J.A. 2), the attorneys awarded fees did not enter the case until later. Benson entered his appearance on behalf of the plaintiffs on March 15, 1979 (J.A. 2). The LDF entered an appearance in the case on May 27, 1982 (J.A. 2).

The liability litigation took a number of years. The liability trial began on October 31, 1983 (J.A. 3). After ninety-two trial days, the liability trial ended on June 13, 1984 (J.A. 3-9). On September 17, 1984, the plaintiff/schoolchildren became prevailing parties when the district court issued its judgment finding the State defendants (Petitioners herein) and the Kansas City, Missouri School District (KCMSD) liable (J.A. 10) (Pet.App. A171-A215).

Footnote continued—

sas City, Missouri v. State of Missouri, 592 F.2d 493 (8th Cir. 1979); *Jenkins v. State of Missouri*, 672 F.Supp. 400 (W.D. Mo. 1987); *Jenkins v. State of Missouri*, 639 F.Supp. 19 (W.D. Mo. 1985); *Jenkins v. State of Missouri*, 593 F.Supp. 1485 (W.D. Mo. 1984); *Black v. State of Missouri*, 492 F.Supp. 848 (W.D. Mo. 1980); *School District of Kansas City, Missouri v. State of Missouri*, 460 F.Supp. 421 (W.D. Mo. 1978); *School District of Kansas City, Missouri v. State of Missouri*, 438 F.Supp. 830 (W.D. Mo. 1977).

Seventeen months later, on February 5, 1986, the attorneys filed their initial motion for attorney's fees and expenses (J.A. 12). Subsequent motions were filed (J.A. 13) and the fees at issue in the instant case involve the time period through June 30, 1986 (Pet.App. A9). This includes the litigation in the remedial phase of the case as well as the first year of monitoring the desegregation plan. The vast majority of the hours compensated, however, was for the period 1981-1984 when the liability phase of the case was litigated.

The fee issues were extensively briefed by all parties and a one-day hearing was held on February 27, 1987 (J.A. 16). On May 11, 1987, the district court issued its order (J.A. 16) (Pet.App. A22). As modified on July 14, 1987 (Pet.App. A44), the district court awarded fees and expenses totalling $4,094,443.66, with Benson awarded $1,728,567.92 and LDF $2,365,875.74 (J.A. 16-17) (Pet.App. A9).[2]

The district court awarded Benson an hourly rate of $200 per hour (Pet.App. A26-A27). The district court determined that reasonable hourly rates for attorneys with litigation experience and expertise comparable to Benson range from $125 to $175 per hour and Benson "would fall at the higher end of this range" (Pet.App. A26). This finding was based on 1986 rates and stands

2. While the fee litigation has been pending, the State has made partial payments to both Benson and the LDF. Of the $1,728,567.92 awarded to Benson, Petitioners have made periodic payments totalling $1,147,332.93 (2/26/86—$200,000; 6/2/86—$100,000; 10/1/86—$47,332.93; 8/3/87—$300,000; 4/29/88—$500,000). Of the $2,365,875.74 awarded to the LDF, Petitioners have paid $1,350,000 (5/29/87—$850,000; 5/2/88—$500,000).

in contrast to Benson's statement that his current billing rate was $125 per hour.[3]

The district court enhanced Benson's rate to $200 per hour, in part, because of preclusion of other employment and undesirability of the case (Pet.App. A26). The court further found it was "essential that [Benson's] hourly rate include compensation for the delay in payment." (Pet.App. A26). The district court did not indicate what portion of the enhancement was due to delay in payment.

For Benson's staff, the district court awarded current hourly rates. The court noted that for the years the services were rendered (1982-1984) the average hourly rate for the two main associates was $60 to $65 per hour (Pet.App. A28). The court, however, awarded $80 per hour finding the "differential . . . necessary to compensate Mr. Benson for the delay in payment" (Pet.App. A28-A29).

Concerning the LDF, the district court awarded fees at "current, rather than historical, rates" to compensate for delay in payment (Pet.App. A33). The court did not consider preclusion of other employment or undesirability of the case in enhancing the hourly rate for any attorney other than Benson.

There were a substantial number of nonattorneys assisting the plaintiffs in this case. These were characterized as paralegals, law clerks or recent law graduates. These labels are irrelevant to the issues in this case and

3. See Motion for Partial Award of Attorneys' Fees and Expenses, filed February 5, 1986, p. 10 (Record on Appeal 293, 303).

Petitioners will refer to all nonattorney paraprofessionals as "paralegals."

The district court awarded current market rates for paralegal services.[4] The court emphasized that it was compensating for "delay in payment by calculating this award based upon the current, rather than historical hourly rates" (Pet.App. A30, A34).

Evidence was presented at the February 27, 1987 fee hearing concerning the actual costs of paralegal services. LDF indicated that paralegal salaries ranged from $18,000 to $24,000 annually, which is approximately $8.50 to $11.50 per hour (Transcript of February 27, 1987 hearing, p. 54). Benson testified that most, if not all, of the paralegals were hired specifically to work on this case and the average hourly salary was $7 per hour (Tr. pp. 125-126).[5] Considering benefits and other overhead associated with paralegal employees, Petitioners suggested that $15 per hour closely approximated the actual costs of the paralegals hired to work on this case (Pet. App. A15).

The Court of Appeals for the Eighth Circuit affirmed the district courts' orders in all respects. Pertinent to the issues involved herein, the Eighth Circuit found that the use of current market rates to compensate for delay in payment was not prohibited by the Eleventh Amendment (Pet.App. A13-A15). The court recognized that paralegal reimbursement has been treated in various ways

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4. The district court awarded $40 per hour for paralegals, $35 per hour for law clerks and $50 per hour for recent law graduates (Pet.App. A29, A34).

5. It is interesting to note that Benson's expert witness, Kansas City attorney Max Foust, testified that he did not bill separately for paralegal services (Tr. pp. 73-74).

by the courts (Pet.App. A15), but found that the district courts use of market rates was not clearly erroneous (Pet.App. A15-A16).

SUMMARY OF THE ARGUMENT

The controlling principle is that an increase in a fee award to compensate for delay in payment is equivalent to an award of interest. This Court's *Library of Congress* decision analyzed this general rule under the fee-shifting provision of Title VII. This Court held that the federal government's waiver of immunity from suit did not also waive the sovereign's immunity from liability for interest on fee awards.

The question is then whether the same express waiver of immunity from liability for interest or delay required for the United States is also required for the States' under the Eleventh Amendment. This Court has required that Congress must express an unequivocal intention to waive the States' Eleventh Amendment immunity in unmistakable language in the statute itself. This standard is virtually identical and intellectually indistinguishable from the degree of congressional clarity required to find a waiver of the federal government's sovereign immunity.

Thus, under 42 U.S.C. § 1988, the States' Eleventh Amendment immunity from interest on fee awards has not been abrogated by Congress. The language of 42 U.S.C. § 1988 does not deal with this issue and the legislative history is silent. While § 1988 does allow "attorney's fees as part of costs", *Library of Congress v. Shaw* clearly holds that these terms do not include interest or compensation for delay.

The other issue involved in this case concerns the proper method of reimbursing paralegal and law clerk services. Again, there is no indication in either § 1988 or the legislative history addressing this issue. Congress did express its intention that § 1988 not result in a "windfall" for attorneys. Permitting reimbursement of paralegal services at market rates would result in a substantial profit to attorneys over and above the actual cost of such employees. There is no indication that Congress intended the attorneys for prevailing parties to receive a substantial profit on paralegal expense from the losing party.

Reimbursement of paralegal expense at actual cost is particularly appropriate in the instant case. The dozens of paralegals and law clerks employed by the attorneys for the plaintiff/schoolchildren were hired specifically for this case. Under such circumstances, reimbursement at actual cost is equitable to all parties and does not run contrary to Congress' intent that attorneys not receive a "windfall" under § 1988.

ARGUMENT

I. The Eleventh Amendment prohibits an award of prejudgment interest or compensation for delay against a State as part of reasonable attorney's fees under 42 U.S.C. § 1988.

In *Library of Congress v. Shaw,* 478 U.S. 310 (1986), this Court held that the federal government's traditional sovereign immunity prohibited an award of interest or compensation for delay as part of reasonable attorney's fees under Title VII. The question in the instant case is whether the States' Eleventh Amendment immunity prohibits an award of prejudgment interest or compensation for delay as part of reasonable attorney's fees under 42 U.S.C. § 1988.

A. The conflicting decisions of the Courts of Appeals.

This issue has resulted in two conflicting decisions in the appellate courts. In the instant case, the Court of Appeals for the Eighth Circuit held that compensation for delay in payment is not prohibited by the Eleventh Amendment. *Jenkins v. State of Missouri,* 838 F.2d 260, 266 (8th Cir. 1988). This conflicts with a prior decision by the Court of Appeals for the First Circuit which held that prejudgment interest on fee awards or compensation for delay is prohibited by the Eleventh Amendment. *Rogers v. Okin,* 821 F.2d 22, 28 (1st Cir. 1987). In reaching opposite conclusions, the two courts disagreed on the applicability of *Library of Congress v. Shaw.*

In *Jenkins*, the Eighth Circuit declined "to extend *Shaw* to the body of Eleventh Amendment law, which was not covered by [*Shaw's*] rationale." 838 F.2d at 265. The Eighth Circuit assumed, without discussion, that the rule of statutory interpretation applicable in suits against the federal government was inapplicable in an Eleventh Amendment analysis. *Id.* The Eighth Circuit also refused to equate prejudgment interest with compensation for delay. Finally, the Eighth Circuit emphasized that "courts have regularly interpreted § 1988 to permit compensation for delay in the payment of fees." *Id.*[6]

In contrast, the First Circuit analyzed the issue in light of *Library of Congress v. Shaw* and the legislative history of 42 U.S.C. § 1988. In addition, unlike the Eighth Circuit, the First Circuit discussed the critical issue of Congress' intent. The First Circuit noted the holding in *Hutto v. Finney*, 437 U.S. 678 (1978), that § 1988 abrogated Eleventh Amendment immunity for attorney's fees, but emphasized this Court's *Library of Congress v. Shaw* decision that prejudgment interest is not considered a component of attorney's fees or costs.

6. The cases cited by the Eighth Circuit in support of this proposition are inapposite, either because a State was not involved, or the Eleventh Amendment issue was not raised. See *Lightfoot v. Walker*, 826 F.2d 516 (7th Cir. 1987) (State involved; no discussion of Eleventh Amendment issue); *Jordan v. Multnomah County*, 815 F.2d 1258 (9th Cir. 1987) (State not involved); *Daly v. Hill*, 790 F.2d 1071 (4th Cir. 1986) (county involved, not State); *Gaines v. Dougherty County Board of Education*, 775 F.2d 1565 (11th Cir. 1985) (State not involved); *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945 (1st Cir. 1984) (State involved; no discussion of Eleventh Amendment issue); *Sisco v. J.S. Alberici Construction Co.*, 733 F.2d 55 (8th Cir. 1984) (State not involved; private defendant); *Ramos v. Lamm*, 713 F.2d 546 (10th Cir. 1983) (State involved; no discussion of Eleventh Amendment).

Rogers v. Okin, 821 F.2d at 27. Reviewing the legislative history of § 1988, the First Circuit correctly noted Congress' silence on whether an attorney's fee award should include prejudgment interest. Because "neither the statutory language nor the legislative history" contained a clear indication of Congress' intent, the First Circuit refused to "infer" a waiver of the States' Eleventh Amendment immunity from "substantial sums of prejudgment interest on attorney's fee awards." *Id.* at 27-28.

As discussed below, the First Circuit's analysis is consistent with the rationale set forth by this Court in *Library of Congress v. Shaw*. More importantly, the First Circuit's decision is a faithful adherence to the rigorous standards established by this Court in numerous cases addressing congressional waivers of the States' Eleventh Amendment immunity.

B. Legislative waiver of the Eleventh Amendment must be unequivocal and expressed in unmistakable language.

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

This Court has repeatedly emphasized the significance of this Amendment "lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III" of the Constitution. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238

(1985); *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 98 (1984) (*Pennhurst II*).

The similarity between the States' Eleventh Amendment immunity and the federal government's sovereign immunity is inescapable; both protect the sovereign from liability. In *Library of Congress v. Shaw*, this Court noted that waivers of immunity must be construed "strictly in favor of the sovereign" and cautioned that the waiver not be enlarged beyond what the language requires. 478 U.S. at 318. The court emphasized that a waiver requires an "*affirmative* congressional choice." *Id.* at 319 (emphasis added).

The language used by this Court in Eleventh Amendment waiver cases is virtually identical to the rigorous standard articulated in *Library of Congress v. Shaw*. In deciding whether Congress has abrogated the Eleventh Amendment immunity, this Court has required a clear expression of legislative intent. In *Atascadero*, this Court emphasized the "well-established" requirement that "Congress unequivocally express its intention to abrogate the Eleventh Amendment bar to suits against the States in federal court." 473 U.S. at 242.

While this Court has recognized that the Eleventh Amendment is "necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment," *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976), this Court has nonetheless required "that Congress must express its intention to abrogate the Eleventh Amendment in *unmistakable* language *in the statute itself*." *Atascadero*, 473 U.S. at 243 (emphasis added).

Petitioners recognize that *Hutto v. Finney*, 437 U.S. 678 (1978), held that the Eleventh Amendment did not prevent an award of attorney's fees payable by the States

when their officials are sued in their official capacities under § 1988, notwithstanding the fact that the statute does not contain an express statutory waiver of the States' immunity. Some may suggest, therefore, that the degree of congressional clarity required to abrogate the Eleventh Amendment immunity under § 1988 is less than that required to waive the federal government's sovereign immunity as discussed in *Library of Congress v. Shaw*.

The analysis employed in *Hutto v. Finney*, however, has been ignored by this Court in more recent decisions regarding the standard for congressional waivers of the Eleventh Amendment. For example, *Atascadero* repeatedly emphasizes the requirement of "an unequivocal expression of congressional intent to 'overturn the constitutionally guaranteed immunity of the sovereign states' ". 473 U.S. at 240, citing *Pennhurst II*, 465 U.S. at 99. See also *Atascadero*, 473 U.S. at 242 ("Congress unequivocally express its intention"); at 243 ("incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the guarantees of the Eleventh Amendment"); *id.* ("the requirement that Congress unequivocally express this intention in the statutory language ensures such certainty"); *id.* ("it is appropriate that we rely only on the clearest indications in holding that Congress has enhanced our power"); *id.* ("Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself").[7]

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7. See also *Welch v. Texas Department of Highways and Public Transportation*, ___ U.S. ___, 107 S.Ct. 2941, 2948 (1987) ("the Court consistently has required an unequivocal expres-

(Continued on following page)

Atascadero is a reaffirmation of this Court's consistent holdings on Eleventh Amendment waiver issues. For example, in *Employees v. Missouri Public Health Department,* 411 U.S. 279 (1973), this Court concluded that Congress did not lift the sovereign immunity of the States by enacting the Fair Labor Standards Act of 1938. This Court emphasized the absence of any indication "by clear language that the congressional immunity was swept away." 411 U.S. at 285. In *Edelman v. Jordan,* 415 U.S. 651 (1974), this Court acknowledged a State may waive its immunity but such a waiver can be found "only where stated 'by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.'" 415 U.S. at 673, quoting *Murray v. Wilson Distilling Co.,* 213 U.S. 151, 171 (1909).

In *Quern v. Jordan,* 440 U.S. 332 (1979), this Court held that 42 U.S.C. § 1983 does not override the States' Eleventh Amendment immunity. This Court further noted that "general language" used by Congress is not sufficient to "overturn the constitutionally guaranteed immunity of the sovereign states." 440 U.S. at 342 (footnote omitted).

Footnote continued—

sion that Congress intended to override Eleventh Amendment immunity"). In *Welch,* the Court held that Congress had not abrogated the States' Eleventh Amendment immunity under the Jones Act. 107 S.Ct. at 2947. In so doing, the Court expressly overruled *Parden v. Terminal Railway of Ala. Docks Dept.,* 377 U.S. 184 (1964), which did not require waiver by "unmistakably clear language." *Id.* at 2948 (Per Justice Powell, with three Justices concurring, and one Justice concurring in the judgment). The repudiated *Parden* analysis is similar to the analysis in *Hutto v. Finney.*

The Eighth Circuit implies that the standard is more lenient when reviewing legislation enacted pursuant to § 5 of the Fourteenth Amendment. The *Atascadero* and *Pennhurst* cases, however, analyze the Eleventh Amendment in terms of Congress' enforcement powers under the Fourteenth Amendment. In *Pennhurst State School and Hospital v. Halderman,* 451 U.S. 1 (1981) (*Pennhurst I*), this Court emphasized that "such legislation imposes congressional policy on a State involuntarily and . . . we should not quickly attribute to Congress an unstated intent . . ." 451 U.S. at 16. *Pennhurst II* reemphasized the requirement of "an unequivocal expression of congressional intent to overturn the constitutionally guaranteed immunity of the sovereign states." 465 U.S. at 99.

Pennhurst II also acknowledges the "vital role of the doctrine of sovereign immunity in our federal system." *Id. Atascadero* expanded on this concept noting that in determining whether Congress has abrogated the Eleventh Amendment immunity, "the courts themselves must decide whether their own jurisdiction has been expanded." 473 U.S. at 243. This Court emphasized that "it is appropriate that we rely only on the clearest indications in holding that Congress has enhanced our power." *Id.*

Thus, this Court has established rigorous guidelines for finding a congressional abrogation of a sovereign's immunity. These strict standards apply when analyzing both the federal government's sovereign immunity or the States' Eleventh Amendment immunity. Neither 42 U.S.C. § 1988, nor its legislative history, contains the unmistakable language necessary to find an unequivocal expression of Congress' intent.

C. 42 U.S.C. § 1988 does not waive the States' Eleventh Amendment immunity from prejudgment interest.

It is undisputed that 42 U.S.C. § 1988 does not contain any language "in the statute itself" addressing Eleventh Amendment immunity. In pertinent part, § 1988 provides:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Neither does the language of § 1988 explicitly address the issue of prejudgment interest or compensation for delay. The question remains whether the language actually used in the statute includes such compensation by implication.

Again, *Library of Congress v. Shaw* provides unmistakable guidance on this issue. There, this Court was considering whether the Civil Rights Act of 1964, § 706(k), as amended, 42 U.S.C. § 2000(e-5)k (Title VII), waived the federal government's immunity from interest. 478 U.S. at 313. That statute provides in relevant part:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the [EEOC] or the United States, *a reasonable attorney's fee as part of the costs*, and the [EEOC] and 'the United States shall be liable *for costs the same as a private person.*'

Emphasis added. This statute contains the language identical to the relevant portion of 42 U.S.C. § 1988. In fact, the legislative history of § 1988 notes its reliance of the "language of Title[] . . . VII of the Civil Rights Act of 1964." S.Rep. No. 94-1011, 94th Cong., 2d Sess., *reprinted in* 1976 Code Cong. & Ad.News 5908, 5910.

The phrase "reasonable attorney's fee as part of costs" is found in both statutes. *Library of Congress v. Shaw* expressly held that the phrase "reasonable attorney's fee" did not waive the federal government's sovereign immunity from interest. 478 U.S. at 320. This Court further held that the term "costs" did not waive the federal government's sovereign immunity from interest. *Id.* at 321.[8]

If *Library of Congress v. Shaw* is applied consistently, then the identical language used in 42 U.S.C. § 1988 also does not evidence Congress' intent to waive the States' Eleventh Amendment immunity for prejudgment interest or compensation for delay. It would be anomalous to suggest that Congress intended a waiver of immunity under § 1988 by use of the phrases "reasonable attorney's fee" and "costs" and did not intend such a waiver when using the identical phrases in Title VII.

Petitioners' position is supported by congressional action in another fee-shifting statute. The 1985 amendments to the Equal Access to Justice Act (EAJA) explicitly permit adjustments to compensate attorneys for "increase[s] in the cost of living." 28 U.S.C. § 2412(d)(2)(A). Thus, when Congress has intended to increase fee awards to

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8. *Library of Congress v. Shaw* further held that the phrase "the United States shall be liable for costs the same as a private person" did not evidence the "requisite affirmative congressional choice" to waive sovereign immunity. 478 U.S. at 319.

compensate for delay, it has done so expressly in the language of the statute.[9]

The First Circuit correctly noted that the "legislative history . . . is completely silent on the subject of prejudgment interest." *Rogers v. Okin*, 821 F.2d at 22. The Senate Report does state that "citizens must have the opportunity to recover what it costs them to vindicate [their civil rights] in court." See S.Rep. No. 94-1011, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908, 5910. *Hutto v. Finney* also suggests that "Congress [may] amend its definition of taxable costs and have the amended class of costs applied to the States . . . without expressly stating that it intends to abrogate the States' Eleventh Amendment immunity." 437 U.S. at 696.[10]

This Court, however, has emphasized that prejudgment interest, compensation for delay, or whatever term

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9. Similarly, when Congress has intended to waive the United States' immunity from interest, it has done so in express language. See, e.g., 28 U.S.C. § 2411 (expressly authorizing pre- and post-judgment interest payable by the United States in tax refund cases). Congress has also reiterated the general rule that interest cannot be allowed absent express waiver. See 28 U.S.C. § 2516 ("Interest on a claim against the United States shall be allowed in a judgment of the United States Claims Court only under a contract or Act of Congress expressly providing for payment thereof"); 28 U.S.C. § 2674 ("The United States . . . shall not be liable for interest prior to judgment" under the Federal Torts Claim Act).

10. In light of subsequent decisions by this Court, particularly *Atascadero*, a reasonable argument could be made that the apparently more lenient standard set forth in *Hutto v. Finney* is no longer valid. Because *Hutto v. Finney* appears to have been superseded in this Court's subsequent Eleventh Amendment waiver decisions, its scope should not be expanded. To hold that § 1988 implicitly allows recovery of prejudgment interest or compensation for delay in payment would cast doubt on the Eleventh Amendment analysis set forth in *Atascadero*, *Quern*, *Edelman*, *Pennhurst I*, *Pennhurst II*, and *Welch*.

used to describe compensation for the time value of money is not a component of "costs." "Costs" is a term of specific and narrow content; in federal adjudication, the word "costs" has never been understood to include any interest component. 28 U.S.C. § 1920. See also 10 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure §§ 2666, 2670 (2d ed. 1983). Historically, prejudgment interest has been viewed as an element of damages, not as a component of "costs." *Id.* § 2664, at 159-60.

In *Library of Congress v. Shaw*, this Court reiterated that "prejudgment interest is considered as damages, not a component of 'costs' . . . A statute allowing costs, and within that category, attorney's fees, does not provide the clear affirmative intent of Congress to waive the sovereign's immunity." 478 U.S. at 321. Therefore, this Court emphasized that the "requirement of a *separate* waiver reflects the historical view that interest is an element of damages separate from the damages on the substantive claim." *Id.* at 314 (emphasis added), citing C. McCormick, Damages § 50, p. 205 (1935).

Hutto v. Finney actually supports, rather than disputes, petitioners' position on this issue. There, this Court indicated that "it would be absurd to require an express reference to State litigants whenever a filing fee, or a new item, such as an expert witness' fee, is added to the category of taxable costs." 437 U.S. at 696-97. In a footnote, however, this Court indicated that the analysis might be different "if Congress were to expand the concept of costs beyond the traditional category of litigation expenses." 437 U.S. at 697, note 27. Because prejudgment interest or compensation for delay is not a traditional component of costs, but rather considered as dam-

ages, a clear affirmative indication from Congress is necessary to waive immunity therefrom.

The legislative history of § 1988, however, contains no indication that Congress intended to expand the traditional components of costs to include prejudgment interest. The legislative history identifies four cases as reflecting the appropriate standards for calculating fee awards. See S.Rep. No. 94-1011, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code Cong. & Ad.News 5908, 5913. None of the four cases, however, addressed the issue of prejudgment interest or compensation for delay.[11]

The Eighth Circuit attempted to avoid the holding of *Library of Congress v. Shaw* by refusing to equate interest with compensation for delay. *Jenkins*, 838 F.2d at 265. The court approved the district court's consideration of "delay as one factor in setting the hourly fee." *Id.* In *Library of Congress v. Shaw*, however, this Court cautioned that "the no-interest rule cannot be avoided simply by devising a new name for an old institution." 478 U.S. at 321. There, the respondent argued that interest and a delay factor had distinct purposes. *Id.* at 322. This Court rejected that argument noting that interest and a delay factor share an identical function, both "designed to compensate for the belated receipt of money." *Id.*

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11. See *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974) (sets forth twelve factors to consider in determining fee awards, not one of which expressly or implicitly deals with prejudgment interest); *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974) (follows modified *Johnson* approach, no discussion of interest); *Swann v. Charlotte-Mecklenburg Board of Education*, 66 F.R.D. 483 (W.D. N.C. 1975) (no discussion of interest); *Davis v. County of Los Angeles*, 8 E.P.D. ¶ 9444 (C.D. Cal. 1974) (no discussion of interest).

The compensation for delay is intellectually indistinguishable from prejudgment interest; both function to compensate the attorney for the delayed receipt of fees. The First Circuit analysis of this issue is consistent with the standards this Court clearly articulated in *Library of Congress v. Shaw*. See *Rogers v. Okin*, 821 F.2d at 26.

The lower courts have consistently applied *Library of Congress v. Shaw* to prohibit interest on fee awards against the federal government whether it be called prejudgment interest, compensation for delay or compensation at current billing rates. See, e.g., *Thompson v. Kennickell*, 836 F.2d 616, 619 (D.C. Cir. 1988) ("*Shaw* precludes . . . use of current billing rates for work performed under the Equal Pay Act"); *Greater Los Angeles Council on Deafness v. Community Television of Southern California*, 813 F.2d 217 (9th Cir. 1987) (Rehabilitation Act case - *Shaw* "prohibit[s] the use of a multiplier to enhance fee awards because of delay in payment"); *Utah International, Inc. v. Department of Interior*, 643 F.Supp. 810, 830 (D. Utah 1986) ("compensation for delay is the equivalent of interest").[12]

The cases discussed in Part I B, *supra*, hold that an unequivocal expression of Congress' intent is required to override the States' Eleventh Amendment immunity. *Hutto v. Finney* recognizes that the "reasons for requiring a formal indication of Congress' intent . . . insures that Congress has not imposed 'enormous fiscal burdens on

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12. While not citing *Library of Congress v. Shaw*, the Court of Appeals for the Third Circuit has held that prejudgment interest could not be awarded under FELA. *Poleto v. Consolidated Rail Corporation*, 826 F.2d 1270, 1279 (3rd Cir. 1987). While the court recognized strong policy considerations in favor of such an award, it noted the decision was for Congress to make. *Id.* at 1274-79.

the States' without careful thought." 437 U.S. at 697, note 27, citing *Employees v. Missouri Public Health Department*, 411 U.S. 279, 284 (1973). Since *Hutto v. Finney*, the Court has reemphasized that "[t]he case for inferring intent is at its weakest where . . . the rights asserted impose *affirmative* obligations on the States . . ., since we may assume that Congress will not implicitly attempt to impose massive financial obligations on the States." *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 16-17 (1981) (emphasis in the original) (*Pennhurst I*).

As demonstrated above, the terms used in § 1988—reasonable attorney's fees and costs—do not include the concept of prejudgment interest or compensation for delay. Therefore, there is certainly no unequivocal evidence of Congress' intent to impose what could be a substantial obligation on the States. Undeniably, prejudgment interest can result in a substantial financial obligation. In *Rogers v. Okin, supra*, the First Circuit's recalculation based on historical rates resulted in a total reduction of about 40%, or approximately $600,000 of a $1.47 million fee award. In the case at bar, similar reductions are anticipated although the exact calculations would be determined on remand.[13]

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13. The use of current rates in the case at bar inflated the fee award more than usual. The plaintiff/schoolchildren became prevailing parties on September 17, 1984 when the district court issued its liability orders (Pet.App. A171). The initial motion for attorney's fees was not filed until seventeen months later on February 5, 1986 (J.A. 12) and 1986 hourly rates were requested. Had the motion been filed in 1984, the hourly rates requested presumably would have been based on 1984 rates. Because the vast majority of the hours compensated were spent on the discovery and liability phase of the litigation, the attorneys were, in effect, rewarded for delaying the fee application.

The use of current market rates to compensate for delay in payment is in effect an award of prejudgment interest. It thus becomes a retroactive award of damages, which is clearly prohibited by the Eleventh Amendment. *Edelman v. Jordan* held that a federal court's remedial power, consistent with the Eleventh Amendment, is limited to prospective injunctive relief and may not include a retroactive award requiring payment of damages from the state treasury. 415 U.S. at 677.

Thus, the Eleventh Amendment is a limitation on the type of relief a party may receive from a State. See *Florida Department of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 689 (1982) ("[Eleventh] Amendment places a limit on the relief that may be obtained by the plaintiff"). While under *Hutto v. Finney*, § 1988 allows for recovery of attorney's fees and costs, the Eleventh Amendment still protects the States from a separate assessment of prejudgment interest.

There may be reasonable policy reasons to compensate civil rights attorneys for the time value of money on fee awards. The vindication of constitutional rights is a legitimate goal of Congress and obviously, the more money lawyers make on civil rights cases, the more civil rights cases will be litigated. In § 1988, however, Congress clearly indicated that other factors had been considered and specifically cautioned that § 1988 should not produce a windfall for attorneys.

Policy arguments, however, should be addressed to Congress. In *Library of Congress v. Shaw*, this Court emphasized that "policy, no matter how compelling, is insufficient, standing alone, to waive . . . immunity." 478 U.S. at 321. See also *United States v. N.Y. Rayon Im-*

porting Co., 329 U.S. 654, 662 (1947), (Courts lack the power to award interest against the United States on the basis of what they think is or is not sound policy).

II. Reimbursing the actual cost of paralegal and law clerk services is appropriate under the facts of this case.

At the current time, there are at least three different approaches to the problem of compensating paralegal services.[14] Some courts consider paralegal services a part of normal office overhead and completely deny separate reimbursement. See, e.g. *Roe v. City of Chicago*, 586 F.Supp. 513, 516 (N.D. Ill. 1984). Others reimburse the actual costs of such services. See *Lamphere v. Brown University*, 610 F.2d 46, 48 (1st Cir. 1979) (reimbursement at actual cost when paralegals hired specifically for purpose of a certain litigation, as in the instant case). See also *Greenspan v. Automobile Club of Michigan*, 536 F.Supp. 411, 415 (E.D. Mich. 1982); *Ross v. Saltmarsh*, 521 F.Supp. 753 (S.D. N.Y. 1981), *aff'd*, 688 F.2d 816 (2nd Cir. 1982). Other courts have reimbursed at market rates. See, e.g. *Ramos v. Lamm*, 713 F.2d 546, 558-59 (10th Cir. 1983). While the policies behind each of these methods differ, one thing is clear from the confusion between the lower courts—Congress has not clearly stated its intention on this issue. Given such uncertainty, this Court should not imply what could be a substantial financial obligation on the States.

In *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), this Court held that absent

14. A similar issue concerning compensation for paralegal expense is currently before this Court in *Blanchard v. Bergeron*, No. 87-1485 (*cert. granted* June 27, 1988).

Congressional authorization, courts lack the inherent power to award attorney's fees to prevailing litigants. As this Court stated, Congress has not "extended any roving authority to the judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted." *Alyeska*, 421 U.S. at 260. Congress enacted 42 U.S.C. § 1988 as a reaction to *Alyeska*. See *City of Riverside v. Rivera*, 477 U.S. 561 (1986). However, the statute only modified the *Alyeska* decision for the matters specified within it, i.e., allowing a reasonable attorney's fee as a part of costs. There is no indication whatsoever in the statute that prevailing litigants are entitled to a reasonable paralegal fee as part of their costs. Therefore, *Alyeska* controls the result of this case with regard to paralegal fees, and the judgment should be reversed and the case remanded. If federal courts do not have any power to award attorney's fees without Congressional authorization, they surely do not have the power to award paralegal fees at market rates without Congressional authorization.[15]

The Petitioners' approach to this issue is also supported by the ordinary rules of statutory construction. In construing a statute, the Supreme Court construes what Congress has written and does not add, subtract, delete or distort the words used. *62 Cases of Jam v. United States*, 340 U.S. 593, 596 (1951). The Fourth Circuit has stated

15. A persuasive argument could be made that paralegal fees should be included in the attorney's reasonable hourly rate as numerous cases have done. In the instant case, however, the State has taken the position that the actual cost method be used. Because the paralegals were employed specifically for this litigation, the State believes the actual cost method is an equitable resolution of this issue.

> [W]e do not think it permissible to construe a statute on the basis of a mere surmise as to what the legislature intended and to assume that it was only by inadvertence that it failed to state something other than what it plainly stated.

United States v. Deluxe Cleaners and Laundry, Inc., 511 F.2d 926, 929 (4th Cir. 1975). Additionally, "[c]ourts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement." *Badaracco v. C.I.R.*, 464 U.S. 386, 398 (1984); *TVA v. Hill*, 437 U.S. 153, 194-95 (1978). Therefore, as there is no discussion of paralegal fees in the statute, market rates should not be awarded against the State.

Further, reimbursing paralegal services at market rates would produce a windfall to attorneys as these market rates have a built in profit factor within them. As the legislative history indicates, § 1988 was never intended to produce windfalls to attorneys. See S.Rep. No. 94-1011, 94th Cong., 6, *reprinted in* 1976 U.S. Code Cong. & Ad. News, 5908, 5913 (cited in *Blum v. Stenson*, 465 U.S. 886, 893-94 (1984)). The legislative history is also silent on whether paralegal and law clerk fees are to be awarded and at what rates.[16] Since Congress has not spoken on this issue, there is no clear indication of Congressional intent and this Court should not rewrite § 1988 to serve any policy purpose.

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16. Only one case cited in the legislative history included any reference to paralegal reimbursement. In *Davis v. County of Los Angeles*, 8 E.P.D. ¶ 9444 (C.D. Cal. 1974), paralegals and law clerks were awarded rates of $10 per hour. The Senate Report, however, cites the case only for its correct applicaton of the *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974), factors, none of which deal with law clerk and paralegal fees.

The acceptance of the State's position that paralegal expenses should only be awarded at actual costs would also make those costs easier to calculate. The attorney requesting paralegal costs would simply reveal through financial records how much the paralegals were generally paid per hour, including benefits. This would avoid unnecessary litigation over this issue. *Cf., Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) (fee request should not result in a second major litigation).

In the instant case, the use of market rates results in a huge profit to the attorneys. The record reflects that the average salary range for the paralegals was between $7 and $11 per hour. For easy calculation, the State suggested that $15 per hour closely approximated the actual costs of such employees when benefits and other overhead are considered. Reimbursing these hours at $35, $40 or $50 per hour results in an unjustified windfall. These paralegals were hired specifically for this case and are an *expense* incurred.

Therefore, reimbursement at actual cost is the appropriate method for compensation. This takes into account the various interests indicated by Congress. Prevailing plaintiffs receive the reasonable costs of such services and the attorneys do not receive a windfall at the expense of Missouri taxpayers.

CONCLUSION

This case is a straightforward application of the principles discussed in *Library of Congress v. Shaw*. Congressional abrogation of immunity must be clearly expressed. In the Eleventh Amendment context, *Atascadero* requires an unequivocal expression of intent in unmistakable language that the States' Eleventh Amendment immunity has been waived. The reasoning of the court below is erroneous because it does not defer to the rigorous standards required for waivers of immunity.

42 U.S.C. § 1988 does not address, either explicitly or by implication, compensation for delay or prejudgment interest on fee awards. Under such circumstances, the Eleventh Amendment retains sufficient vitality to prohibit the assessment of this separate, retroactive financial obligation on the States.

Further, under the factual circumstances of this case, paralegal services should be reimbursed at actual costs. The paralegals were hired specifically to assist in the prosecution of this case. Reimbursement at actual costs results in fair compensation, but does not provide a windfall at taxpayer expense.

Accordingly, for all the above reasons, Petitioners pray this honorable Court to reverse the decision of the court of appeals and to remand this case for a redetermination of the attorney's fees award. On remand, the district court would determine the historical hourly rates to be used in calculating the lodestar. The court would also

recalculate the award for paralegal services based on actual costs.

Respectfully submitted,

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